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No. 04-851

IN THE

# Supreme Court of the United States

AQUAMAR S.A.,

*Petitioner*,

*v.*

E.I. DU PONT DE NEMOURS AND CO.,

*Respondent.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA DISTRICT COURT OF APPEAL, FOURTH DISTRICT**

## REPLY BRIEF


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## STATEMENT PURSUANT TO RULE 29.6

Petitioner's Corporate Disclosure Statement was set forth at page *ii* of its Petition for a Writ of Certiorari, and there are no amendments to that Statement.

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## REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

We reply only to respondent's argument as to this Court's jurisdiction. On the merits of the petition for writ of certiorari and the relationship of this case to *Bates v. Dow Agrosciences LLC*, No. 03-388 (U.S. *argued* Jan. 10, 2005), we rely on the arguments contained in the petition.

### THIS COURT HAS JURISDICTION; NO CONSTITUTIONAL BASIS SUPPORTED FLORIDA SUPREME COURT JURISDICTION, THEREFORE IN THIS CASE DISCRETIONARY REVIEW WAS NOT AVAILABLE AND THE DISTRICT COURT OF APPEAL WAS "THE HIGHEST COURT OF A STATE IN WHICH A DECISION COULD BE HAD" (28 U.S.C. § 1257(a))

Respondent Du Pont argues that petitioner failed to exhaust all available state court appellate review and that, as a consequence, this Court lacks jurisdiction under 28 U.S.C. § 1257. (Br. in Opp., pp. 1, 6-9). However, Du Pont is wrong. The Florida authorities cited are properly quoted, but misapplied. No Florida Supreme Court case holds that a litigant must seek discretionary review where there is no basis for doing so, as here. Thus, because no further state appellate remedies were available under the jurisdictional provisions of the Florida Constitution (Article V, § 3(b)) or the Rules of Appellate Procedure (Rule 9.030, Fla.R.App.P.), the District Court of Appeal was "the highest court of a state in which a decision could be had" (28 U.S.C. § 1257(a)), and this Court's jurisdiction was properly invoked. Because the jurisdiction of the Florida Supreme Court is central to this argument, we set forth the relevant provisions of Article V, Section 3(b), Florida Constitution, and of Rule 9.030, Fla.R.App.P., delineating the court's mandatory and discretionary appellate jurisdiction, in an Appendix to this Reply.

Florida law did not *allow* petitioner any further state court review from the decision of the District Court of Appeal, much less *require* it. Du Pont's primary authority, *Florida Star v. B.J.F.*, 530 So. 2d 286 (Fla. 1988), which said, correctly (as a matter of federal law) "[t]o seek review of a state court judgment in the United States Supreme Court, a litigant first must exhaust all avenues of review *available* in the courts of the state . . . " (*id.* at 289) (emphasis supplied) (*see* Br. in Opp., p. 7), did not hold that discretionary review is "available" to every Florida litigant. Clearly, it is not. Nor did *Florida Star* hold, as respondent suggests, that a party must seek discretionary review in the Florida Supreme Court when (as here) there is no jurisdictional basis to do so.[1]

In *Florida Star*, a newspaper that had unsuccessfully challenged the constitutionality of a statute criminalizing the publication of a rape victim's name sought discretionary review in the Florida Supreme Court, asserting "express and direct conflict," one of the permitted jurisdictional bases for discretionary review contained in the Florida Constitution. *See* 530 So. 2d at 287, n. 1, *citing* Art. V, Section 3(b)(3),

1. The Florida Supreme Court cited *federal* cases for that "must exhaust all avenues of review available" statement – a statement that we do not dispute. *See Florida Star*, 530 So. 2d at 289 (*citing American Ry. Express v. Levee*, 263 U.S. 19 (1923) (arising from Ohio state courts); and *Stratton v. Stratton*, 239 U.S. 55 (1915) (arising from Ohio state courts)). *Florida Star* did not hold as a matter of state law, nor has any subsequent Florida decision ever held, that discretionary review is "available" to every Florida litigant. On the contrary, the Florida Supreme Court has recognized its own "limited discretionary review jurisdiction," as set forth in Article V, Section 3(b), Florida Constitution. *See Persaud v. State*, 838 So. 2d 529, 532 (Fla. 2003).

Fla. Const. (*see* Appendix, 1a, 3a, *infra*).[2] Review was denied, and in this Court the respondent contended that the petition for certiorari was untimely because the denial of discretionary review meant that the Florida Supreme Court had not had jurisdiction and the time for seeking certiorari review from the district court of appeal decision had expired. That argument did not prevail.

This Court certified a question to the Supreme Court of Florida, not asking a general question about Florida appellate jurisdiction, but a case-specific question: "Whether the Florida Supreme Court had jurisdiction, pursuant to Article V, Section 3(b)(3) of the Florida Constitution or otherwise, to hear Appellant's appeal in this cause from the Florida First District Court of Appeal?" *Florida Star v. B.J.F.*, 484 U.S. 984 (1987). The answer was similarly circumscribed:

> [W]e limit our answer to the context in which the question was posed. For that sole purpose, we answer the question in the affirmative. This Court in the broadest sense has subject-matter

2. While the "express and direct" conflict provision affords a creative litigant the most latitude in arguing that a district court of appeal decision should be reviewed by the Florida Supreme Court, and the district court opinion need not identify the conflicting decision (*see Ford Motor Co. v. Kikis*, 401 So. 2d 1341 (Fla. 1981)), the party seeking discretionary review must, at a minimum, be able to identify the decision purportedly giving rise to the conflict. Here, while respondent asserts that "the Florida Supreme Court could have reviewed the decision of the Florida District Court of Appeal" (Br. in Opp., p. 6), respondent offers no Florida case even arguably giving rise to express and direct conflict, and indeed no Article V, Section 3(b) Florida Constitutional basis under which petitioner could have sought to invoke the jurisdiction of the Florida Supreme Court. There was none. *See* Br. in Opp. at 18 ("to the best of our knowledge, this is the first case to decide the FIFRA preemption issue").

> jurisdiction under article V, section 3(b)(3) of the Florida Constitution, over any decision of a district court that expressly addresses a question of law within the four corners of the opinion itself. That is, the opinion must contain a statement or citation effectively establishing a point of law upon which the decision rests. The opinion in *B.J.F.* unquestionably met this requirement.

*Florida Star v. B.J.F.*, 530 So. 2d at 288 (footnote omitted).

Influenced by a "procedural quagmire" that would ensue if the answer were otherwise, *id.* at 289, the court premised its holding on "two separate concepts" created and defined by Article V, Section 3(b) of the Florida Constitution -- a general grant of subject-matter jurisdiction, and "a constitutional command as to how the discretion itself may be exercised," the latter defined as "a limiting principle dictated to this Court by the people of Florida." 530 So.2d at 288. Thus, the court recognized that its subject-matter jurisdiction is broader than the circumstances under which it is authorized to exercise that jurisdiction, which may only be exercised where one of the bases set forth in Article V, Section 3(b) exists.

Pertinent to the certified question posed by this Court in *Florida Star*, the Florida Supreme Court said it had "the final and inherent power to determine what constitutes express and direct conflict," 530 So.2d at 288, the jurisdictional basis that had been asserted in *Florida Star*'s petition for discretionary review, and that where a party asserts that conflict exists the denial of "conflict" review does not mean that the court did not have *jurisdiction* to make the determination that either no conflict was present, or, if conflict did exist, that review should be denied nonetheless.

The court concluded that it "had complete subject-matter jurisdiction to hear *B.J.F.* and decide the case on its merits with finality," even though it had declined to exercise that jurisdiction. *Id.* at 289.

But *Florida Star* did not present, and therefore did not answer, the question of whether a party who has *no* basis under the Florida Constitution under which to assert Florida Supreme Court jurisdiction must attempt to do so nevertheless, in order to exhaust state court review. That was not the "context' in which the case and the certified question were presented. That is *this* case, and the answer must be no. Under Florida procedure, a notice to invoke the Florida Supreme Court's jurisdiction must set forth the constitutional/appellate rules jurisdictional basis for the petition (*see* Rule 9.900(d), Fla.R.App.P.). If no jurisdictional basis exists, a requirement that discretionary review be sought in order to exhaust state court review would present an untenable Catch-22 – a requirement to do that which cannot be done.[3]

3. Litigants might be motivated to make even the most tenuous "conflict" arguments in the Florida Supreme Court, in order to avoid a jurisdictional argument by the respondent in this Court. That would be a permissible route, under *Florida Star*, but cannot be a required route if no arguable conflict or other jurisdictional basis is present. Here, for example, despite respondent's protestations that discretionary review should have been sought, respondent has failed to articulate any available basis for Florida Supreme Court review. The reason is that, in this case, discretionary review was not available and the District Court of Appeal was the court of last resort. *See* 1980 Committee Notes to Rule 9.030, Fla.R.App.P. (Jurisdiction of Courts) ("revised subdivision (a) limits the supreme court's appellate, discretionary, and original jurisdiction to cases that substantially affect the law of the state. The district courts of appeal will constitute the courts of last resort for the vast majority of litigants under amended article V.").

Respondent's argument that "the Florida Supreme Court routinely decides cases involving questions of federal preemption" (Br. in Opp., p. 7), misses the point. In each of the four cases cited in the Brief in Opposition (*id.* at 7-8), jurisdiction was invoked in the Florida Supreme Court based on Florida constitutional grounds unrelated to preemption – grounds not present in this case. *State v. Otte*, 887 So. 2d 1186 (Fla. 2004), involved the court's *mandatory* jurisdiction to review "decisions of district courts of appeal declaring invalid a state statute." Art. V, § 3(b)(1), Fla. Const. In *Villazon v. Prudential Health Care Plan, Inc.*, 843 So. 2d 842 (Fla. 2003), and *Carter v. Brown & Williamson Tobacco Corp.*, 778 So. 2d 932 (Fla. 2000), the court noted "express and direct conflict" with a decision of another district court of appeal, and jurisdiction under Article V, § 3(b)(3). And *Doe v. America Online, Inc.*, 783 So. 2d 1010 (Fla. 2001). involved a certified question of great public importance from the district court of appeal, which provides jurisdiction under Article V, § 3(b)(4). Those cases therefore do not aid respondent's argument here, where none of those jurisdictional bases were present.

Thus, we do not suggest, as respondent says, that the Florida Supreme Court has no jurisdiction to review FIFRA preemption *per se*. *See* Br. in Opp., p. 7. We submit only that that court had no jurisdiction to review the decision below, because there was no express and direct conflict, no certified question, and no other basis on which petitioner could have grounded a petition for discretionary review of the FIFRA preemption issue.

If this Court has any question about Florida law, based on the parties' differing arguments on this point, the Court

should certify a question to the Supreme Court of Florida. *See* Art. V, § 3(b)(6), Fla. Const. ("The Supreme Court [of Florida] . . . may review a question of law certified by the Supreme Court of the United States . . . which is determinative of the cause and for which there is no controlling precedent of the supreme court of Florida"). That procedure was followed in *Florida Star*, and the answer to the question in this case, if provided by the Florida Supreme Court, would complement the *Florida Star* decision and aid this Court and Florida litigants. We suggest that the question could be:

> Whether a district court of appeal decision that expressly addresses a question of law within the four corners of the opinion may fail to present any express and direct conflict or any other basis for Florida Supreme Court review, thus making such review unavailable and making the district court of appeal the highest court in which a decision could be had?

The answer would be yes. The ultimate answer is that this Court has jurisdiction to grant certiorari.[4]

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4. Respondent says that "petitioner's position reduces to the untenable proposition that the Florida Supreme Court has no jurisdiction to review the written decisions of the Florida District Courts of Appeal. That is not and could not be the law of Florida." (Br. in Opp., p. 9). "Untenable" it may be, but that *is* the law of Florida. *See* Pet. Cert., p. 1, n. 1 (*citing* cases); *see generally* John M. Scheb, *Florida's Courts of Appeal: Intermediate Courts Become Final*, 13 Stetson L.Rev. 479 (1984) (discussing intermediate court finality as restored by the 1980 amendment to article V of the Florida Constitution).

## CONCLUSION

This Court has jurisdiction under 28 U.S.C. § 1257(a), because no jurisdictional basis for mandatory or discretionary review in the Florida Supreme Court existed, and the District Court of Appeal was the "highest court of a state in which a decision could be had." If any question persists, this Court should certify a question to the Florida Supreme Court, pursuant to Article V, Section 3(b)(6), Florida Constitution.

The petition for writ of certiorari should be granted, after *Bates v. Dow Agrosciences LLC* is decided.

Respectfully submitted,

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# APPENDIX

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## Article V, Section 3(b), Fla. Const.

(b) JURISDICTION. – The supreme court:

(1) Shall hear appeals from final judgments of trial courts imposing the death penalty and from decisions of district courts of appeal declaring invalid a state statute or a provision of the state constitution.

(2) When provided by general law, shall hear appeals from final judgments entered in proceedings for the validation of bonds or certificates of indebtedness and shall review action of statewide agencies relating to rates or service of utilities providing electric, gas, or telephone service.

(3) May review any decision of a district court of appeal that expressly declares valid a state statute, or that expressly construes a provision of the state or federal constitution, or that expressly affects a class of constitutional or state officers, or that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.

(4) May review any decision of a district court of appeal that passes upon a question certified by it to be of great public importance, or that is certified by it to be in direct conflict with a decision of another district court of appeal.

(5) May review any order or judgment of a trial court certified by the district court of appeal in which an appeal is pending to be of great public importance, or to have a great effect on the proper administration of justice throughout the state, and certified to require immediate resolution by the supreme court.

(6) May review a question of law certified by the Supreme Court of the United States or a United States Court of Appeals which is determinative of the cause and for which there is no controlling precedent of the supreme court of Florida.

* * *

**Rule 9.030, Fla.R.App.P. (footnotes omitted)**

(a) Jurisdiction of Supreme Court.

(1) Appeal Jurisdiction.

(A) The supreme court shall review, by appeal

(i) final orders of courts imposing sentences of death;

(ii) decisions of district courts of appeal declaring invalid a state statute or a provision of the state constitution.

(B) If provided by general law, the supreme court shall review

(i) by appeal final orders entered in proceedings for the validation of bonds or certificates of indebtedness;

(ii) action of statewide agencies relating to rates or service of utilities providing electric, gas, or telephone service.

(2) Discretionary Jurisdiction. The discretionary jurisdiction of the supreme court may be sought to review

(A) decisions of district courts of appeal that

(i) expressly declare valid a state statute;

(ii) expressly construe a provision of the state or federal constitution;

(iii) expressly affect a class of constitutional or state officers;

(iv) expressly and directly conflict with a decision of another district court of appeal or of the supreme court on the same question of law;

(v) pass upon a question certified to be of great public importance;

(vi) are certified to be in direct conflict with decisions of other district courts of appeal;

(B) orders and judgments of trial courts certified by the district court of appeal in which the appeal is pending to require immediate resolution by the supreme court, and

(i) to be of great public importance, or

(ii) to have a great effect on the proper administration of justice;

(C) questions of law certified by the Supreme Court of the United States or a United States court of appeals that are determinative of the cause of action and for which there is no controlling precedent of the Supreme Court of Florida.

* * *